CANADIAN HUMAN RIGHTS TRIBUNAL

Annual Report 2014

Providing Fair Access to Justice for Canadians

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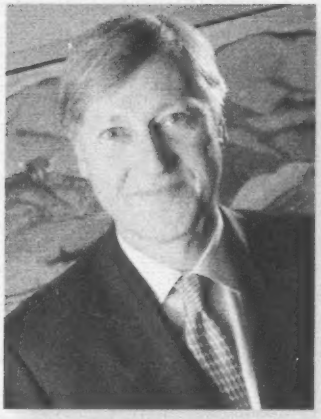
CHAIRPERSON'S MESSAGE



As the newly appointed Chairperson of the Canadian Human Rights Tribunal, it is my honour to present this 2014 Annual Report to Parliament and to all Canadians. As my seven-year term commenced on September 2, most of the year passed under the able guidance of our Vice-Chairperson, Susheel Gupta, who was the Acting Chairperson for more than two years before my appointment. We owe him a debt of gratitude for his service during this period.

The Canadian Human Rights Tribunal is an adjudicative body that hears complaints of discrimination under the *Canadian Human Rights Act*. We are governed by the laws enacted by Parliament and subject to interpretations of those laws issued by superior courts. Generally speaking, administrative tribunals like ours have been created to provide access to justice that is expedient, timely, accessible and administered by subject experts. This works very well for many subject areas, where principles of fairness and justice need to be adhered to, but where the formality of traditional court recourse would render it cost prohibitive and less accessible.

For our tribunal, the particular challenge is that while we want to be expedient, accessible and to bring our level of expertise to the inquiry, the stakes are very high. For complainants who have been traumatized by discrimination, the process is very difficult for them, emotions run very high and the wounds are deep. On the other side, no one likes to be a respondent to a human rights complaint, as alleged discrimination carries with it connotations of serious wrong-doing that are potentially damaging to personal or corporate reputations. As such, we are an administrative tribunal, set up to do things quickly and expediently, yet with very high stakes at risk. It challenges us to run a process that is open, and that gives both sides the opportunity to present their case fairly, and yet try to do that in a timely and cost-effective manner.

We live in a pluralistic country with people from a variety of backgrounds and points of view. Canada is a snapshot of the future, as the world grows smaller and smaller each decade. What binds us together is not a symbolic mosaic of distinct parts, but the commonality of what we all value, as what we freely choose to believe in. Our acceptance of the *Canadian Human Rights Act* is a clear message to the world that these are values we embrace as being fair, respectful and dignifying.

The challenge for a pluralistic society like Canada is how do we preserve those values, ensure we pass them on to our children and also instill a clear understanding of them on the many people we invite to live amongst us each year. Part of the answer is our continued embrace of legislation like the *CHRA*, which codifies and mandates the expectations that we, as Canadians have for our conduct in dealing with each other. Discrimination is not widely tolerated in Canada.

> *"Our acceptance of the* Canadian Human Rights Act *is a clear message to the world that these are values we embrace as being fair, respectful and dignifying."*

It is not acceptable to most Canadians to even hear a suggestion of prohibited discrimination, let alone engage in it. However, we do continue to see examples of discrimination and that is why the Tribunal continues to exist, to ensure that our standards are maintained and human rights respected at every level.

Canadian human rights tribunals have been the subject of some criticism in the past. The preservation of our commitment to human rights depends on us making credible decisions that are always transparent, justifiable, and intelligible - three fundamental requisites of a reasonable decision. Moreover, we have a duty to make decisions that reflect broad Canadian values so that our work continues to be respected and valued. Enhancing our credibility and reputation will be one of my highest goals in the years ahead.

The Tribunal's performance in 2014 remained steady. We continued to offer mediation services as an alternative dispute settlement mechanism and in 75 per cent of the cases, the mediation led to a successful settlement. To improve our efficiencies at hearings, we conducted 150 case management conference calls with parties. The tribunal released 14 decisions and 22 rulings in 2014. Our current caseload is 370 files. Another significant effort of the past year was the development of a new on-line guide for participants, soon to be released. This was developed after consultations with stakeholders and we hope that it will become an effective tool to help inquiries proceed smoothly and efficiently.

As my term got underway, we experienced, and are still experiencing, a transition into the new world of the Administrative Tribunal Support Service of Canada (ATSSC), designed to bring greater efficiencies and economies to 11 different federal tribunals, including the CHRT. We are ably led by Marie-France Pelletier, Chief Administrator of the ATSSC, and I look forward to working with her in the years to come.

Our Tribunal currently consists of 10 Members, seven of whom are part-time and based in other parts of Canada. Together with our ATSSC staff dedicated to the CHRT Secretariat, we play a small role in the overall administration of justice in Canada. However, it is a very important role that deserves our utmost commitment to fairness and equity to all.

Original signed by
David L. Thomas,
Chairperson

WHAT WE DO

The Canadian Human Rights Tribunal is a quasi-judicial body that inquires into complaints of discrimination referred to it by the Canadian Human Rights Commission and decides whether the conduct alleged in the complaint is a discriminatory practice within the meaning of the *Canadian Human Rights Act*. The Tribunal can also review directions and assessments made under the Employment Equity Act.

The Tribunal operates pursuant to the *Canadian Human Rights Act*, which aims to give effect to the principle that all individuals should have an equal opportunity to live their lives unhindered by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex (including pregnancy), marital status, family status, sexual orientation, disability (including drug dependency) or pardoned criminal conviction. The discriminatory practices outlined in the Act are designed to protect individuals from discrimination, in particular, in employment, and in the provision of goods, services, facilities, and commercial or residential premises.

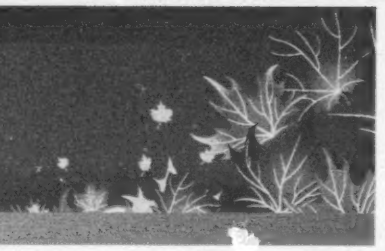
"Like a court, the Tribunal must be—and must be seen to be—impartial. It renders decisions that are subject to review by the Federal Court at the request of any of the parties."

The Act applies to federally regulated employers and service providers, including: federal government departments and agencies, federal Crown corporations, chartered banks, airlines, shipping and inter-provincial trucking companies, telecommunications and broadcasting organizations, and First Nations governments and federally regulated Aboriginal organizations.

Like a court, the Tribunal must be—and must be seen to be—impartial. It renders decisions that are subject to review by the Federal Court at the request of any of the parties. However, unlike a court, the Tribunal provides an informal setting where parties can present their case without adhering to complex rules of evidence and procedure. If the parties are willing, the Tribunal also offers mediation services to allow parties the opportunity to settle their dispute with the assistance of a Tribunal Member.

Support for the Members rests with the CHRT Secretariat of the ATSSC, which plans and arranges hearings, provides legal research, and acts as a liaison between the parties and Tribunal Members.

HOW THE TRIBUNAL WORKS



The work of the tribunal involves conducting mediations and hearings, issuing rulings and rendering decisions. Parties to a complaint include the complainant, the respondent, the Commission, and at the discretion of the Tribunal, any other interested parties.

MEDIATION

Parties to proceedings before the Tribunal have the option of trying to address their differences through voluntary and confidential mediation. The goal of the mediation is to try to reach a solution to the dispute between the complainant and the respondent in an informal environment. If an agreement is reached at mediation, there will be no Hearing.

The mediator is a neutral and impartial Member of the Tribunal with expertise in human rights matters, whose role is to assist the parties to a complaint in resolving their differences. The mediator is there to facilitate discussions between the parties and ensure that they occur in an atmosphere of good faith, courtesy and respect. The mediator has no power to impose a solution or agreement.

HEARING

A Hearing is where the parties to the complaint are given the opportunity to present their witnesses' testimony, other evidence and argument to the Tribunal. The objective of the Hearing is to allow the Tribunal to hear the merits of the case so it can decide whether discrimination has occurred. It also allows the parties to present evidence and submissions on the appropriate remedy to be ordered, in the event the complaint is substantiated. The length of the Hearing depends on the complexity of the case and the number of witnesses. The average length of a Hearing before the Tribunal is five days.

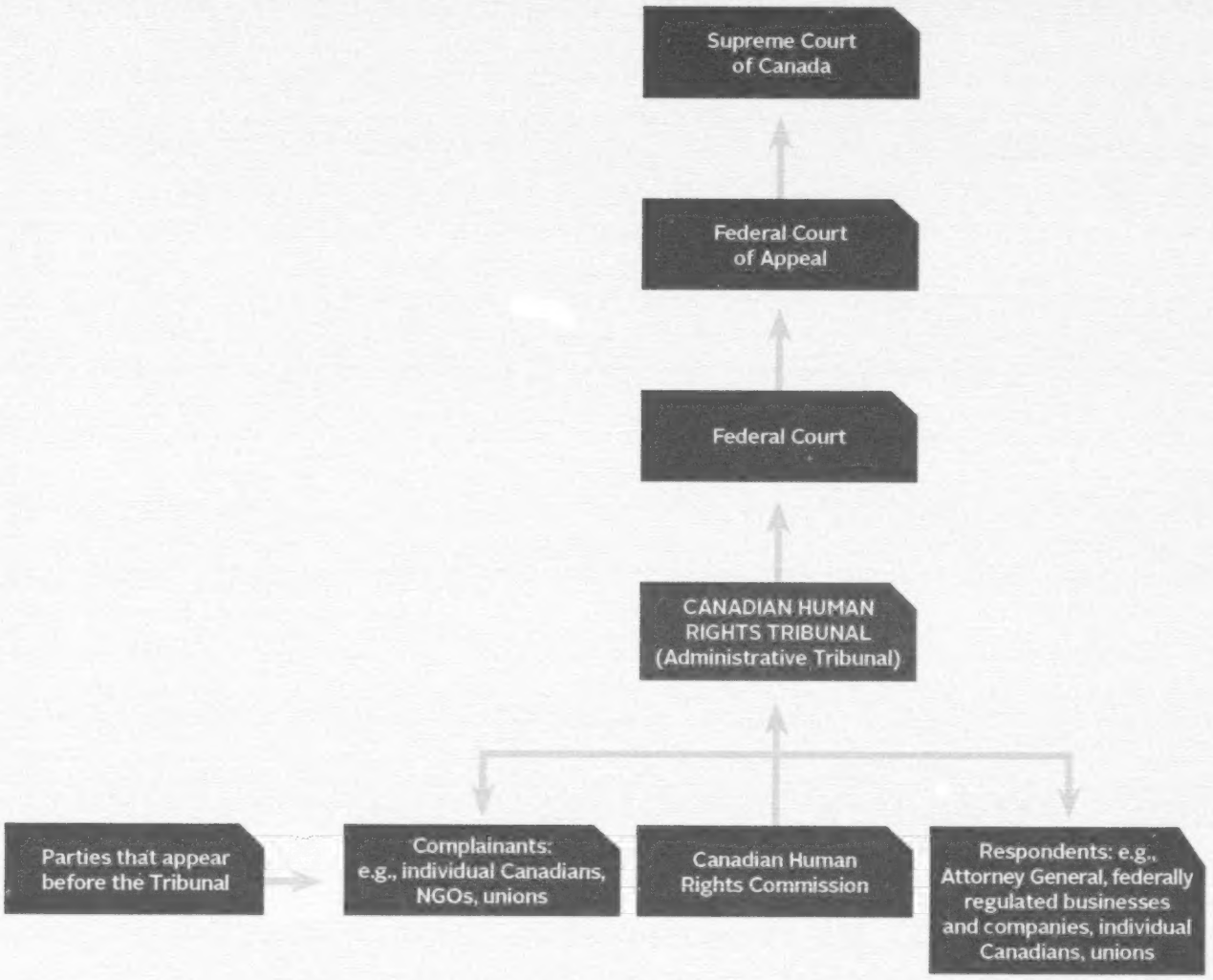
DECISIONS

For the purpose of this report, a "decision" is defined as a set of adjudicative reasons issued by a Member or Panel of the Tribunal following a hearing, which actually decide the question of whether a discriminatory practice occurred in a given case. If a complaint is substantiated, the decision may also order a remedy to rectify the discrimination.

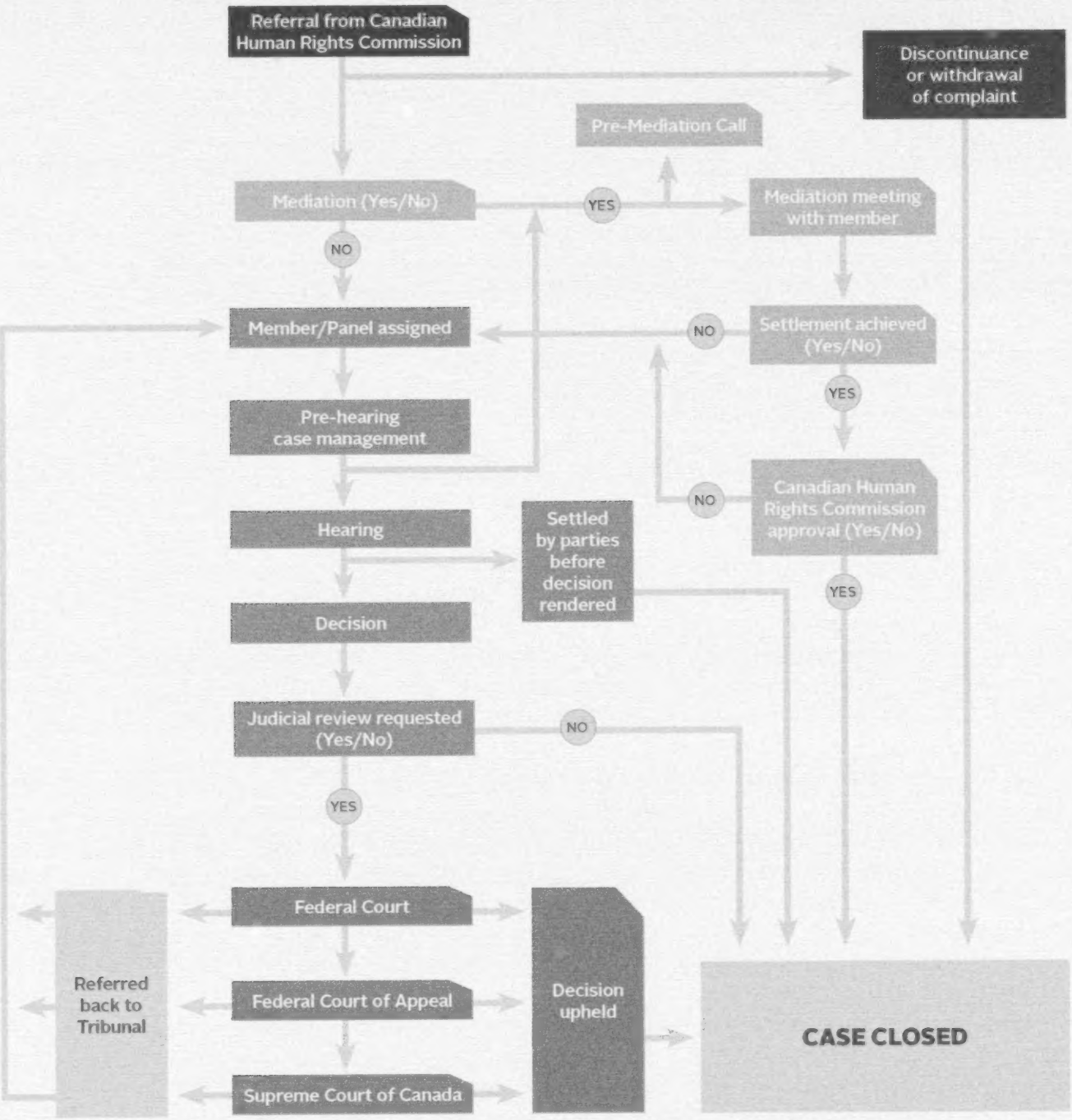
RULINGS

All sets of adjudicative reasons issued by the Tribunal that do not qualify as decisions (i.e. they do not actually decide whether a discriminatory practice occurred) are classified as rulings. For example, a ruling would be issued where a complaint is dismissed for lack of jurisdiction, abuse of process, delay, irreparable breach of fairness, etc. or where the issue before the Tribunal is a motion for some type of procedural or evidentiary order.

PARTIES BEFORE THE TRIBUNAL AND AVENUES OF JUDICIAL REVIEW AND APPEAL


Supreme Court of Canada
Federal Court of Appeal
Federal Court
CANADIAN HUMAN RIGHTS TRIBUNAL (Administrative Tribunal)
Parties that appear before the Tribunal
Complainants: e.g., individual Canadians, NGOs, unions
Canadian Human Rights Commission
Respondents: e.g., Attorney General, federally regulated businesses and companies, individual Canadians, unions

TRIBUNAL INQUIRY PROCESS AND JUDICIAL REVIEW



TRIBUNAL CASELOAD
(JANUARY 1 – DECEMBER 31, 2014)

TREND ANALYSIS

Despite active case management throughout the year, the number of complaints referred by the Commission compared to the number resolved by the Tribunal resulted in a break-even count of our caseload at the end of 2014. The year started with a caseload of 369 complaints and ended with 370.

Ninety individual new cases were referred by the Commission between January and end of December 2014. Eighty-nine cases, received in earlier years, were closed.

While mediations as a mechanism for alternative dispute resolution continue to be successful in settling individual complaints, they are not always an appropriate tool for the more complex complaints that involve multiple parties and new areas of alleged systemic discrimination.

Self-represented complainants continue to require accommodation as they try to navigate their way through the quasi-judicial process of the Tribunal. In some cases, complainants experience significant difficulty in attempting to define the issues or meet target dates for submitting the particulars of their case.

Complainants are often surprised to learn that an apparently positive decision by the Commission does not bring the *CHRA* process to a conclusion, but instead leads to the next stage: adjudication. Respondents, for their part, are typically concerned about the length of the process and about the potential damage to their personal or corporate reputation by being named in a complaint.

Respondents are almost always represented by counsel. This is not always the case with the complainants. Yet, it is not unusual for parties to retain new representatives or to cancel their representation throughout the life cycle of their case. This ultimately challenges the Tribunal's ability to ensure fair yet expedient access to justice.

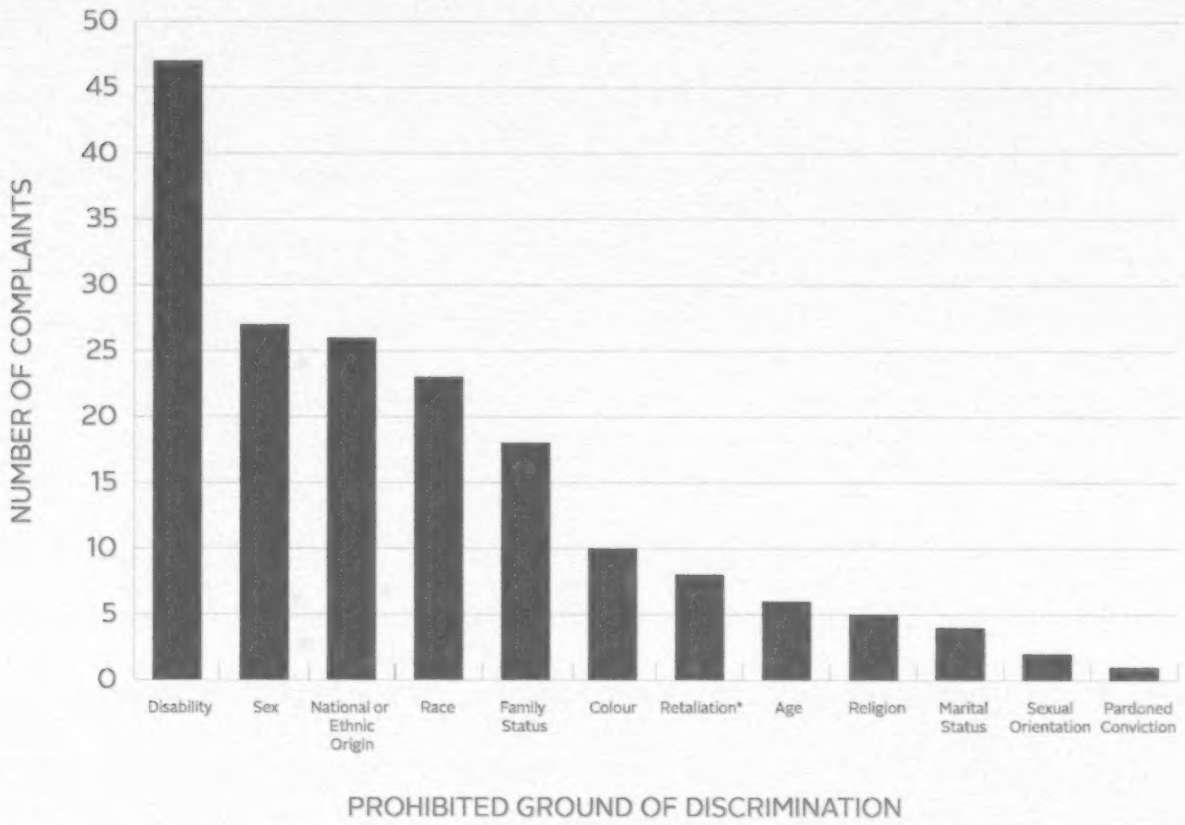
A new "Guide to Understanding the Canadian Human Rights Tribunal" was developed this year and will be published on the Tribunal's website in 2015 and tested in operations. It is hoped that this will ameliorate results and assist in making our process more accessible to all parties.

REPRESENTATION OF PARTIES IN 2014 COMPLAINTS

PARTY	SELF-REPRESENTED	REPRESENTED BY COUNSEL	NON-LAWYER REPRESENTATIVE
Complainants	53	26	11
Respondents	4	84	2

COMPLAINTS RECEIVED FROM THE COMMISSION IN 2014 – BY PROHIBITED GROUND OF DISCRIMINATION

Complaints of discrimination based on the ground of disability (47) continue to top the list, followed by sex (27), national or ethnic origin (26), race (23), family status (18), colour (10), retaliation* (8), age (6), religion (5), marital status (4), sexual orientation (2) and pardoned conviction (1). It should be noted that one complaint can have multiple grounds.



*"Retaliation" is not a prohibited ground of discrimination *per se*. It is a discriminatory practice in respect of which no prohibited ground need be invoked. Instead, the complainant needs to provide evidence of a connection between the treatment complained of and the fact that an earlier complaint had been previously filed. See s. 14.1 of the *CHRA*.

RESOLVED THROUGH MEDIATION

A total of 50 mediations were held during the calendar year, 37 of which were settled at mediation, representing a resolution rate of 74 per cent. 22 complaints were settled between the parties with some intervention by the Tribunal, and 15 complaints were withdrawn.

RESOLVED THROUGH HEARINGS/ DECISIONS/RULINGS

A total of 14 decisions and 22 rulings were rendered following 119 public hearing days. Efforts to streamline the adjudicative process continue to be made. 150 pre-hearing case management conference calls were held to help resolve procedural issues, better define the questions in dispute and thereby potentially reduce the number of hearing days.

CASES BEING HELD IN ABEYANCE

Over 140 "bundled cases" where the complaints are all against the same respondent and the facts of each complaint are virtually identical, as well as "similar complaint clusters", are being held in abeyance. These cases are awaiting judgments from the Federal Courts that are expected to resolve key legal issues in the files.

OPERATING ENVIRONMENT

The CHRT experienced substantive changes during the year under review, while continuing to deliver successfully on its core mandate. There were significant changes in internal operations and personnel. However service delivery as well as Tribunal powers, duties and functions remained the same.

TRANSITION OF CHRT STAFF TO A NEW ADMINISTRATIVE ORGANIZATION

On March 28, 2014, the Government announced its intention to consolidate the internal operations of 11 federal administrative tribunals into a single integrated organization and create the Administrative Tribunals Support Service of Canada (ATSSC). This change was introduced as part of Bill C-31, The Economic Action Plan Act 2014, No. 1 – Part 6 – Division 29, and is consistent with the Government's priority to improve the efficiency of government operations. The Bill received Royal Assent on June 19, 2014.

On November 1, 2014 ATSSC came into being, as a creature of the *Administrative Tribunals Support Service of Canada Act*, S.C. 2014, c. 20, s. 376 (the "*ATSSCA*"). All staff and resources that support the 11 tribunals, including the CHRT, were transferred to this new department. The newly appointed Chief Administrator became the Chief Executive Officer responsible for the provision of support services to tribunals in areas such as registry, legal, administration, human resources, information technology, financial services, accommodations and communications.

Of particular significance however is that this administrative change did not affect the powers, duties, functions and mandate of the CHRT. The Tribunal maintains its separate identity. The Chairperson of the CHRT continues to have supervision over and direction of the work of the Tribunal. Discrimination complaints continue to be referred from the Commission to the CHRT, where they are managed, adjudicated or otherwise resolved in accordance with existing CHRT procedures.

The CHRT Members retain control of cases to which they have been assigned and they continue to exercise the adjudicative authority previously granted to them by ss. 50, 52 and 53 of the *CHRA*. Section 12 of the *ATSSCA* makes clear that the Chief Administrator's powers, duties and functions do not extend to any of the powers, duties and functions conferred by law on any administrative tribunal or on any of its members.

TRANSITION TO ATSSC - GUIDING PRINCIPLES

The Acting Chair of the CHRT and senior staff worked closely with the Steering Committee, led by the Treasury Board Secretariat, as well as with the ATSSC implementation team at Justice Canada, to ensure that the new organization will meet the needs of CHRT, the parties appearing before it, and its stakeholders. Working groups drawn from across the tribunal organizations collaborated to develop appropriate policy frameworks and delegation instruments (e.g. financial and human resources authorities) and to address transition issues linked to the creation of a new government organization.

Fundamental guiding principles throughout this period focused on ensuring a seamless transition whereby:

- Service to Canadians continues without interruption, and
- Respect for and well-being of staff remain a priority.

The smooth transfer of staff, as well as other accomplishments leading up to December 31, 2014, is a true testimony to the success of this initiative. Collaborative efforts between the Tribunal (the CHRT Chairperson and other Tribunal Members), the CHRT Secretariat (the Executive Director, Registry and Legal Teams) and ATSSC Corporate Services continue to aim for more effective and efficient support services to improve access to justice for all Canadians.

TRIBUNAL ACTIVITIES

TRIBUNAL APPOINTMENTS

Over the course of the reporting period, the Governor in Council appointed the new Chairperson of the CHRT, formerly a part-time Member, for a seven-year term (commencing September 2014), and a new Part-time Member for a three-year term (commencing May 2014). This brings the total complement of Tribunal Members to ten (Chairperson, Vice-chairperson, one full-time Member and seven part-time Members).

The *CHRA* specifies that a maximum of 15 Members, including a Chairperson and a Vice-chairperson, may be appointed by the Governor in Council.

The terms of two part-time Members (one from British Columbia, and one from Québec) expired in February 2014, but they have been granted permission pursuant to s. 48.2(2) of the *CHRA* to complete cases they were seized with adjudicating prior to the expiry of their appointments. They cannot however be assigned to any new cases.

INTERNATIONAL COOPERATION

In December 2014, the Chairperson was invited by the Korean Ministry of Justice to represent Canada and the Tribunal at a multinational symposium held in Seoul, South Korea. He shared his first-hand experience with the CHRT's mandate, jurisdiction, and its operations.

MEMBERS MEETING

A two-days meeting was held in October for the full-time and part-time Members. The agenda included discussion of legal developments, case law updates, best practices in mediation, and decision drafting techniques. The Chairperson and the Executive Director of the CHRT Secretariat took this opportunity to brief the Members on the transition to ATSSC, and to consult them on current Registry operating procedures, forms and letters.

SIGNIFICANT TRIBUNAL DECISIONS AND RULINGS

The following case summaries provide information about some Tribunal decisions or rulings that were particularly significant in their impact.

TURNER V. CANADA BORDER SERVICES AGENCY 2014 CHRT 10

Mr. Turner alleged CBSA discriminated against him, pursuant to section 7 of the *Act*, on the grounds of age, race, disability and national or ethnic origin. He also raised the issue of perceived disability on the basis of obesity. His claim arose out of the manner in which he was excluded from two staffing processes for employment as a Border Services Officer in Victoria and Vancouver.

In a preliminary analysis, the Tribunal found that discrimination on the basis of disability encompasses perceived disability as well as actual disability. Furthermore, the Tribunal noted that it is well established that a person's weight is a characteristic that can ground a claim of discrimination on the basis of disability. The Tribunal added that section 3.1 of the *Act* also specifically provides that a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.

At the time he applied for each competition, Mr. Turner was working as a seasonal Customs Inspector in Victoria and had done so from 1998 to 2003. He had always received positive performance reviews from his supervisors. However, approximately two months before his interview for the Victoria job, his supervisor sent an email to a number of members of the CBSA management group setting out his perceived failings, including that he shies away from harder tasks and looks for the easy way out. Mr. Turner was the only seasonal employee who was the subject of such an email.

Following the interview for the Victoria job, Mr. Turner was informed that he was unsuccessful in the competition as he was found not to have met all of the assessment criteria required for the position. He had been interviewed by a Superintendent he had previously worked with and who had written positive performance reports of his work. However, the Tribunal found that the interview panel dogmatically excluded from its assessment the fact that Mr. Turner had competently worked as a Customs Inspector for the previous five years.

Furthermore, the Superintendent contacted another Superintendent shortly after the interview in an attempt to corroborate his opinion that Mr. Turner had been untruthful in describing how he dealt with an agitated traveller. In fact, Mr. Turner had been truthful in his description. The Tribunal ultimately found the Superintendent had negatively stereotyped Mr. Turner as a lazy, older, obese, Black man, and had decided to deny him the job opportunity on this basis. In the Tribunal's view, the previous email circulated to management regarding Mr. Turner confirmed this stereotypical view of Mr. Turner.

As for the Vancouver job, the advertisement stated that "Applicants who have been interviewed for this position since January 1, 2002 will not be considered for this process". CBSA meant the requirement to apply to applicants who had been interviewed anywhere in British Columbia and the Yukon. Mr. Turner interpreted the eligibility restriction to apply only to applicants who had previously applied for employment as a Customs Inspector in the Vancouver region. Therefore, when asked at the interview whether he had been interviewed after January 1, 2002, for the position, Mr. Turner said he had not and did not disclose previous interviews he had had for Customs Inspector positions.

The interviewer for the Vancouver job recognized Mr. Turner from a previous job competition. After the interview, he checked to see if Mr. Turner met the eligibility requirement and confirmed that he did not. While recognizing that the eligibility requirement was vague, he disqualified Mr. Turner from the competition and assumed he had been untruthful in failing to disclose his prior interviews. Mr. Turner was the only candidate screened out on the basis of the eligibility restriction, even though a consistent application of that restriction would have screened out other candidates as well. The Tribunal found that, but for the eligibility restriction, Mr. Turner would have qualified for the staffing pool in the Vancouver process. It concluded that discrimination had been a factor in Mr. Turner's denial of employment because someone obtained the position who was no better qualified than the complainant, but lacked the age, race and perceived disability attributes of Mr. Turner. CBSA did not provide a reasonable explanation for the differential treatment. Its failure to do so, combined with the other evidence in the case, led the Tribunal to find that Mr. Turner's exclusion from the competition was a pretext for discrimination.

As a result, the complaint was substantiated. The Tribunal retained jurisdiction to decide the issue of remedy following a further hearing.

This decision is currently subject to an application for judicial review before the Federal Court of Canada.

RESULTS FOR CANADIANS

The significance of this decision lies primarily in its analysis and subsequent conclusion that discrimination on the basis of disability encompasses perceived disability as well as actual disability. Building on the principle that a person's weight can be a characteristic grounding a claim of discrimination based on disability, the Tribunal determined that perceived disability on the basis of weight is a prohibited form of discrimination contemplated by the *Act*. Through this purposive interpretation of the *Act*, the Tribunal concluded that, based on societal perceptions of his combined weight, age and race, Mr. Turner had been discriminated against.

CROTEAU V. CANADIAN NATIONAL RAILWAY COMPANY 2014 CHRT 16

Mr. Croteau was a conductor for Canadian National Railway Company (CN). However, due to various injuries and a mental disability, he had been unable to work in his conductor's job since 2004 and had been on leave since May of 2008. Mr. Croteau made 11 allegations of harassment against CN, pursuant to section 14 of the *Act*, and alleged a continuing failure on the part of CN to accommodate him, pursuant to section 7(b) of the *Act*.

On a non-suit motion from CN, two of the allegations of harassment were dismissed preliminarily for lack of evidence. The remainder of the harassment allegations stemmed from a conversation between Mr. Croteau and the Risk Management Officer (RMO) at CN. Mr. Croteau claimed that, during this conversation, the RMO had insisted on knowing what personal medical issue had prompted his request for a Short Term Disability form. Furthermore, she was rude and became increasingly angry when he would not tell her. The Tribunal found while the RMO may have been aggressive, assertive, impatient or even rude during the conversation with Mr. Croteau, she did not ask him to disclose the personal medical issue. Even if she had, the Tribunal stated such a question would have been more akin to an attempted breach of privacy rather than harassment under the *Act*.

The other alleged incidents of harassment were claimed to be linked to, or influenced by his conversation with the RMO: a conspiracy-like attempt or vendetta to harass him and terminate his employment with CN. These incidents included meetings related to his performance at work, investigations into his injuries, video surveillance of Mr. Croteau and his family, and a denial of tuition reimbursement. The Tribunal found no harassment based on a prohibited ground in respect of these incidents, nor any link between these events and the initial conversation with the RMO.

With regard to the allegation that CN failed to accommodate the Complainant, the Tribunal described Mr. Croteau's condition as "anxiety related disorders". They stemmed from the "work related issues" forming his harassment allegations, but grew to the point where they became a chronic and "generalized" mistrust of CN. The Tribunal found CN had made many attempts to accommodate Mr. Croteau, but that he did not fully cooperate in the process and fell short at times of his legal obligation to participate in the accommodation dialogue. The Tribunal also found there was no available, suitable work that fit within Mr. Croteau's restrictions. Therefore, the Tribunal found CN had successfully established that it could not accommodate the Complainant without incurring undue hardship, pursuant to sections 15(1)(a) and 15(2) of the *Act*.

While CN was not found to be in breach of the *Act*, the Tribunal did observe that some aspects of CN's accommodation process fell short of "best practices". In particular, it remarked on the need to communicate with accommodated, injured and disabled employees; changes to transitional work plans; and, the need to obtain updated/current medical information.

RESULTS FOR CANADIANS

In this Decision, the Tribunal provides insightful analysis and interpretation of the *Act*, examples of which include the Tribunal's examination of its jurisdiction surrounding non-suit motions; its overview of the type of conduct that constitutes harassment under the *Act*; and, its analysis of the duty to accommodate. On this last point, this Decision serves as a valuable reminder to Complainants that they have responsibilities and obligations in the accommodation process and that they cannot expect a perfect solution.

As a final note, despite the complaint being dismissed, the Tribunal provided additional remarks regarding some aspects of CN's accommodation process. While not indicative of liability under the *Act*, these types of remarks may provide useful guidance to employers and employees generally.

HUGHES V. TRANSPORT CANADA 2014 CHRT 19

Mr. Hughes maintained he was discriminated against contrary to section 7 of the *Act*, on the basis of disability, when he was unsuccessful in four competitions for positions with Transport Canada. He also alleged that Transport Canada retaliated against him contrary to section 14.1 of the *Act* given that he had filed other complaints against the Canada Revenue Agency (CRA) and Canada Border Services Agency (CBSA).

In three of the competitions at issue, Mr. Hughes was screened out because he did not meet the qualifications for the job. The Tribunal found Transport Canada's reasons for doing so were legitimate and not a pretext for discrimination. Therefore, these aspects of the complaint were dismissed.

However, the Tribunal did find discrimination existed with respect to Mr. Hughes' application for a marine security analyst position. In this competition, he passed the interview stage and proceeded to the reference check stage. But, Mr. Hughes had difficulty obtaining references from his previous employers (CRA and CBSA) due to previous complaints that he had filed against them. He disclosed this situation to Transport Canada. He also indicated that he experienced depression as a result of the incidents that had given rise to the CRA and CBSA complaints.

Given the circumstances, Mr. Hughes was allowed to submit documents, as opposed to references, that would assist the selection board in assessing his past performance. However, the documents Mr. Hughes submitted were considered insufficient and incomplete by Transport Canada, who expressed a preference to communicate with persons directly rather than refer to the documents provided.

In the end, Mr. Hughes did not win the competition. The Tribunal found Transport Canada had been significantly influenced by the lack of references, and should have taken a more liberal approach in this regard, considering Mr. Hughes' circumstances. According to the Tribunal, the lack of references should have been offset by the amount of positive documentation showing Mr. Hughes met the criteria for the job. Had this been done, the Tribunal noted that Mr. Hughes' assessment would have been comparable to that of the other candidates. Additionally, the Tribunal found it troubling that certain positive comments had been erased from Mr. Hughes' application without explanation.

The Tribunal noted that Mr. Hughes had informed Transport Canada of his previous complaints against CRA and CBSA, and that he had also informed them about his related disability. The Tribunal found that this situation had affected Mr. Hughes' ability to get references. Given that the lack of references had factored into Transport Canada's decision not to hire Mr. Hughes, the Tribunal found that the complaint was substantiated with respect to the marine security analyst position.

Turning to the allegations of retaliation, the Tribunal conducted an interpretive analysis of section 14.1 of the *Act* to determine whether the section could apply to Transport Canada in the circumstances of this complaint. That is, to determine whether Transport Canada was "a person against whom a complaint has been filed" or "any other person acting on their behalf", within the meaning of section 14.1 of the *Act*.

The allegations of retaliation stemmed from CRA's and CBSA's refusal to provide references to Mr. Hughes for use in his job competitions with Transport Canada. Mr. Hughes alleged that their refusal to provide references was linked to his previous complaints against them. As the allegations of retaliation stemmed from Mr. Hughes' complaints against CRA and CBSA, in which Transport Canada was not involved, the Tribunal found Transport Canada could not be "a person against whom a complaint has been filed". On the question of whether Transport Canada was acting on CRA's and CBSA's behalf in allegedly retaliating against Mr. Hughes, the Tribunal found no evidence to support this claim. As a result, Mr. Hughes' allegations of retaliation were dismissed.

RESULTS FOR CANADIANS

This Decision provides another helpful analysis of the law surrounding retaliation under section 14.1 of the *Act*. In the unique circumstances of this case, the Tribunal was called upon to assess the validity of a claim that one federal government institution retaliated against a person for having filed a complaint against other federal government institutions. The answer in this case, based on the wording of section 14.1, is that such a claim requires evidence establishing that the alleged retaliating institution is acting on behalf of the other institutions; such evidence was not present in this case.

This Decision also serves as a helpful illustration of how intent is not a necessary element for a finding of discrimination. While Transport Canada had a preference for in-person references, and this preference was not based on discriminatory intentions, the effect of applying this policy in Mr. Hughes' circumstances was to discriminate against him. This decision stresses the need to tailor accommodation measures to the individualized circumstances of each person.

A.B. V. EAZY EXPRESS INC. 2014 CHRT 35

The Complainant was a courier contractor for Eazy Express Inc. until she was terminated. She claimed the employer discriminated against her, pursuant to section 7 of the *Act*, by considering her pregnancy as a factor in its decision to end her employment. Pursuant to section 10 of the *Act*, she also alleged her situation was reflective of a larger practice whereby Eazy Express encouraged couriers to quit, or terminated their employment, when they became pregnant.

When the Complainant became pregnant, she informed some of her colleagues, but did not directly inform her supervisor. Shortly thereafter, the Complainant was terminated. The reason given to her was that she was committing too many performance errors. The Complainant claimed that before that time she had never been made aware of any performance issues. The Complainant called two former colleagues to testify before the Tribunal as to their workplace experiences after becoming pregnant while working for Eazy Express. One of the women left her job after becoming pregnant, while the other indicated that she hired someone to take over her duties while on pregnancy leave, so that she would not lose her job.

The Tribunal found there was no evidence to support the allegation that Eazy Express knew of the Complainant's pregnancy, or that the pregnancy factored into its decision to terminate her employment. Having informed her colleagues of her pregnancy, the Complainant assumed it was common knowledge in the workplace. However, in the Tribunal's view, an abstract belief, without some evidence to confirm that belief, was not enough to establish a case.

The Tribunal also did not accept the argument that Eazy Express encouraged couriers to quit, or terminated them when they became pregnant. As contractors, the couriers did not have access to maternity leave employment insurance benefits. That was the reason why one of the witnesses left Eazy Express: to get another job where she would qualify for the benefits. The other witness was not fired or encouraged to quit during or following her pregnancies; rather, she hired someone to replace her. While the assumption was that she would have lost her job had she not found a replacement, the witness indicated in her testimony that she did not approach Eazy Express to discuss her job security in connection with her pregnancies, nor did she discuss with them the issue of pregnancy accommodation generally.

The Tribunal also found Eazy Express' explanation for the termination to be reasonable, and not a pretext for discrimination. Based on the evidence of the Complainant's supervisors and other co-workers, the Tribunal determined that the Complainant had had job performance issues, which had been brought to her attention multiple times, and which she had been warned about.

As a result, the complaint was dismissed.

RESULTS FOR CANADIANS

This decision serves as a useful reminder to complainants about the requirements for establishing a case under the *Act*. There must be some evidence from which the Tribunal may infer that a prohibited ground of discrimination factored into the practice forming the subject of the complaint. A simple belief or assumption that discrimination played a part in the events giving rise to the complaint, without something more, will not be enough to substantiate a complaint. While what evidence will be sufficient to substantiate a complaint will vary from case to case, the Tribunal's decision provides a helpful example of the type of evidence that a Tribunal may require to support a claim that a loss of employment was related to a complainant's pregnancy.

RULINGS ON MOTIONS AND OBJECTIONS

In addition to decisions, the full text of all written reasons in support of rulings rendered in 2014 on motions and objections can be found on the Tribunal's website.

MEMBERS OF THE TRIBUNAL

BIOGRAPHIES

FULL-TIME MEMBERS

DAVID THOMAS
THE CHAIRPERSON

David Thomas attended the University of British Columbia and the American College of Switzerland, graduating with a Bachelor of Arts degree, cum laude, in International Political Studies. He graduated from Osgoode Hall Law School in Toronto and was called to the Bar of British Columbia in 1989. Mr. Thomas began his career at a large law firm in Vancouver. In 1994, he formed his own law firm to focus his practice on immigration and administrative law.

In private practice, Mr. Thomas was a regular guest speaker for the Canadian Bar Association, the BC Society for Continuing Legal Education and other professional organizations. His work has required extensive international travel and as such, Mr. Thomas is well experienced with numerous cultures, traditions and customs. Mr. Thomas also has a keen interest in international human rights, and has taken the opportunity to visit and research troubled regions around the world.

Mr. Thomas has served several non-profit organizations, including as President of the Canada-Korea Business Association, Chair of the West Vancouver Parks & Recreation Commission and Province President of Phi Delta Phi International Legal Honours Society.

Mr. Thomas became a part-time Member of the CHRT in 2013. He was appointed Chairperson of the Tribunal for a term of 7 years commencing on September 2, 2014.

SUSHEEL GUPTA
VICE-CHAIRPERSON

Appointed as Vice-chairperson in August 2010, Susheel Gupta was re-appointed in June 2013 for a five-year term. He served as Acting Chairperson from April 2012 to August 2014. He obtained his Bachelor of Arts at the University of Waterloo in 1993 and his J.D. from the University of Ottawa in 1998. Called to the Ontario Bar in February 2000, he has been serving most of his career in the federal public service, as a prosecutor and computer crime advisor, as a special advisor at the Canadian Air Transport Security Authority, and as counsel in the Crimes Against Humanity and War Crimes section of the Department of Justice. Mr. Gupta is currently on leave from the Public Prosecution Service of Canada.

As a community member and public servant, Mr. Gupta has been the recipient of the Government of Canada Youth Award for Excellence, the Deputy Minister of Justice Humanitarian Award and, the Ontario Justice Education Network Chief Justice Lennox Award and the Queen's Diamond Jubilee Medal.

SOPHIE MARCHILDON
FULL-TIME MEMBER

Sophie Marchildon was appointed in 2010 as a full-time Member of the Canadian Human Rights Tribunal and was reappointed in June 2013 for another three-year term. She completed her Bachelor of Laws at the Université du Québec à Montréal. She completed her Master's Degree in International Law and International Politics at the Université du Québec à Montréal and was the recipient of the 2006 Award of Excellence for Best Student in the International Human Rights Law Clinic. She is currently pursuing an Executive Conflict Management Certificate from the University of Windsor Law School. She is a member of the Quebec Bar.

Ms. Marchildon has practiced civil litigation, immigration law, human rights law and health law in private practice and within various organizations. She served as a lawyer and co-director at the Council for the Protection of the Sick (Conseil pour la protection des malades) from 2005 to 2006, and was an assessor and member of the Quebec Human Rights Tribunal. She volunteered on several clinical ethics committees between 2005 and 2010, and worked as an ombudsman for health care services in the province of Quebec from 2006 until her appointment to the Canadian Human Rights Tribunal in May 2010.

With a licence in mediation from the Quebec Bar, Ms. Marchildon has handled more than 200 mediations in the realm of human rights and the health care system. She was part of the Quebec Ministry of Health and Social Services' Team of Visitors, which evaluated the quality of services and users rights in nursing homes across the province of Quebec.

PART-TIME MEMBERS

MATTHEW D. GARFIELD (ONTARIO)

Matthew D. Garfield was appointed as a part-time Member of the Canadian Human Rights Tribunal in 2006 and re-appointed in 2011.

Mr. Garfield is a lawyer, chartered mediator and chartered arbitrator. He is the president of ADR Synergy Inc., a firm that specializes in mediations, arbitrations, workplace investigations and assessments, and the monitoring of implementation of Court/Tribunal orders. Mr. Garfield is also an adjudicator at the Indian Residential Schools Adjudication Secretariat.

From 2000 to 2004, Mr. Garfield was the Chair of the Human Rights Tribunal of Ontario. He had joined the Ontario Tribunal as Vice-Chair in 1998. He both adjudicated and mediated cases under the *Ontario Human Rights Code* involving claims of discrimination, harassment and reprisal. Prior to his appointment to the Ontario Tribunal, Mr. Garfield practised law in Toronto.

Mr. Garfield graduated from Dalhousie Law School in 1988 and was a recipient of the class prize in Constitutional Law. He was called to the Nova Scotia Bar in 1989 and the Ontario Bar in 1992.

EDWARD LUSTIG (ONTARIO)

Edward Lustig was re-appointed in 2011 to a five-year term as a part-time Member of the Canadian Human Rights Tribunal.

Mr. Lustig received his Bachelor of Arts from the University of Toronto, his Bachelor of Laws from Queen's University, and was called to the Bar of Ontario with First Class Honours in 1975. He has been a member of the Law Society of Upper Canada and the Canadian Bar Association since 1975. Mr. Lustig joined the legal department of the City of Niagara Falls in 1975 and, after 27 years of dedicated service, he retired in 2002. In January 2006 he joined Broderick & Partners as counsel and carries on a general law practice with particular emphasis on municipal law, planning and development matters, commercial and real estate law, and related litigation. Mr. Lustig also has experience in labour matters, including employment and pay equity.

GEORGE E. ULYATT (MANITOBA)

George Ulyatt was appointed in December 2012 to a three-year term as a part-time member of the Canadian Human Rights Tribunal. He holds a Bachelor of Arts degree from Brandon University and a Bachelor of Laws degree from the University of Manitoba. Mr. Ulyatt was called to the Manitoba Bar in 1976 and has been in private practice for more than 35 years, litigating major cases in the Courts of Manitoba.

Mr. Ulyatt has worked with several administrative tribunals, serving as counsel to the Mental Health Review Board of Manitoba and the College of Registered Psychiatric Nurses of Manitoba, among others. He has previously been appointed an Inquiry Officer under the *Expropriation Act* and has conducted public inquiries throughout Manitoba.

As a community member and a volunteer, Mr. Ulyatt has been active in amateur sport at the team, provincial and national levels, serving a five-year term as President of Hockey Manitoba and as a member of the Board of Directors of Hockey Canada. In 2006 he received Hockey Canada's Order of Merit for contributions to hockey in Canada.

OLGA LUFTIG (ONTARIO)

Olga Luftig was appointed in December 2012 to a three-year term as a part-time member of the Canadian Human Rights Tribunal. She holds an Honours Bachelor of Arts degree in history and political science, as well as a Bachelor of Education from the University of Toronto. She received her Bachelor of Laws degree from the University of Windsor.

A practising lawyer, Ms. Luftig also serves as a part-time member of both the Town of Markham Municipal Election Audit Compliance Committee and the York Region Catholic and York Region District School Boards' Joint Election Compliance Audit Committee.

Ms. Luftig has had wide-ranging experience in diverse areas of the law, as both a former corporate in-house properties lawyer and as a private practitioner.

She also served as a member of the Landlord and Tenant Board of Ontario, where she adjudicated hearings.

RICKI T. JOHNSTON (ALBERTA)

Ricki Johnston was appointed in June 2013 to a three-year term as a part-time member of the Canadian Human Rights Tribunal. She obtained her Bachelor of Education with Distinction from the University of Alberta in 1996 and her Bachelor of Laws with Distinction, also from the University of Alberta, in 1999. She has continued as a member of the Alberta Bar since being called in 2000.

Ms. Johnston practiced general civil litigation including in oil and gas, employment, insolvency and securities matters in the Province of Alberta until 2010. She has appeared before various courts, administrative and professional regulatory bodies and commissions. Since 2011, she has worked as a consultant with a private charitable foundation, with a focus on early childhood development, addiction and mental health.

RONALD S. WILLIAMS (ONTARIO)

Ronald Williams was appointed in June 2013 to a three-year term as a part-time member of the Canadian Human Rights Tribunal. He received his Bachelor of Arts degree at McMaster University in 1969 and obtained his LL.B degree from York University (Osgoode Hall), Toronto, in 1972. He was called to the Ontario Bar in 1974 and has been a member of the Law Society of Upper Canada in good standing since then.

Mr. Williams is a general practitioner in a private practice and has experience as corporate counsel. Mr. Williams' career has included representations before administrative tribunals, as well as serving as legal counsel to various groups, such as veteran associations, religious, and ethnic organizations. Professional affiliations include the Canadian Bar Association, Lincoln Law Association, Hamilton Law Association, and Canadian Association of Corporate Counsel.

As a community member and volunteer, Mr. Williams has been involved as a Board Member and/or Officer of numerous community organizations that address the health care needs of children, adult and children rehabilitation, social and financial assistance of those in need, as well as charity fundraising.

LISA GALLIVAN (NOVA SCOTIA)

Lisa Gallivan was appointed in May of 2014 for a three-year term as a part-time member of the Canadian Human Rights Tribunal. She holds a Bachelor of Commerce degree, a Masters of Business Administration and Bachelor of Laws from Dalhousie University. She has been a member of the Nova Scotia Bar since being called in 1997.

Ms. Gallivan has practiced at Stewart McKelvey in Halifax, Nova Scotia since completing law school in 1996. Her practice focuses on labour and employment law including employment contracts, human rights, collective bargaining, workplace investigations, occupational health and safety, grievance arbitration and wrongful dismissal litigation. She has appeared before various courts, administrative and professional regulatory bodies and commissions.

Ms. Gallivan is co-editor of Stewart McKelvey's HRLaw blog. She is also a presenter, trainer and facilitator providing on-site training for employees and executives on all workplace matters including facilitation of executive meetings and retreats, policy development and strategic business planning.

Ms. Gallivan is a former lecturer at St. Mary's University and Mount Saint Vincent University in Halifax, Nova Scotia.

Professional affiliations include the Canadian Bar Association, Canadian Association of Counsel to Employers and Canadian Corporate Counsel Association.

As a community member and volunteer, Ms. Gallivan has been a Board Member and Officer of numerous community organizations including, Homebridge Youth Society, Big Brothers, Big Sisters of Greater Halifax, Brigadoon Children's Society and the Halifax YWCA.

MEMBERS WHOSE TERM EXPIRED IN 2014 BUT WHO REMAIN SEIZED WITH ADJUDICATING UNFINISHED CASES

WALLACE G. CRAIG (BRITISH COLUMBIA)

Wallace Gilby Craig was re-appointed in 2011 to a three-year term as a part-time Member of the Canadian Human Rights Tribunal. A former judge, he worked in the justice system for 46 years, including 20 years in a general practice.

Judge Craig was promoted to the Bench in 1975 and presided over the Vancouver Criminal Division—Provincial Court of British Columbia from 1975 until 2001. After retirement in his hometown of Vancouver, Judge Craig became the author of *Short Pants to Striped Trousers: The Life and Times of a Judge in Skid Road Vancouver*. He had earned his LL.B. from the Faculty of Law at the University of British Columbia.

RÉJEAN BÉLANGER (QUEBEC)

Réjean Bélanger was re-appointed in 2011 to a three-year term as a part-time Member of the Canadian Human Rights Tribunal. Mr. Bélanger is a lawyer and certified mediator.

He holds a Bachelor of Education from the Université de Montréal, as well as a Bachelor of Arts, a Bachelor of Commerce, a Master of Education and a Bachelor of Law from the University of Ottawa. Mr. Bélanger was admitted to the Quebec Bar in 1980 and has conducted a private practice in Gatineau, Quebec, principally in the areas of labour and administrative law.

He received his accreditation as a mediator in the areas of civil, commercial and family matters in 1997. He has argued before several administrative tribunals, the Superior Court of Quebec, the Court of Appeal and the Supreme Court of Canada.

Before becoming a lawyer, Mr. Bélanger served as deputy secretary of the Franco-Ontarian Teachers Association and as director of the Regional Office of the Teachers Association of West Quebec. He is also an active member of the board of directors of three non-profit organizations involved in bringing aid to African countries, the Antilles (Haiti) and Central America (Honduras).